STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JESSICA A. SEALE	)	
	)	
VS.	)	W.C.C. 00-01099
	)	
OAKLAND GROVE HEALTH CENTER	)	

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter came to be heard before the Appellate Division upon the petitioner/employee's appeal from an adverse decision and decree entered on September 6, 2005. The case was heard as an employee's original petition alleging injuries to the right knee, right hip and back on November 12, 1999 during the course of her employment with the respondent which resulted in partial incapacity from November 12, 1999 to December 6, 1999 and total incapacity from December 7, 1999 and continuing. At a pretrial conference conducted on March 22, 2000, the petition was denied and a timely claim of appeal was filed by counsel for the employee for a trial *de novo*. On September 6, 2005, the trial judge entered a decree finding that the employee suffered a work-related injury to her right knee, specifically a right medial meniscus posterior horn tear, and granted benefits for partial disability for the period November 13, 1999 through October 27, 2000. From this decision and decree, the employee filed the instant appeal. After reviewing the record and considering the written and oral arguments of the parties, we deny the employee's appeal and affirm the findings and orders of the trial judge.

On November 12, 1999, the employee sustained a work-related injury while attempting to move an overweight and immobile resident at the Oakland Grove Health Center (hereinafter, "Oakland Grove"). The employee was employed as a certified nursing assistant (CNA). There was conflicting testimony as to how the employee participated in helping to move the patient off the toilet. Michelle Cahill, the employee's supervisor at the time of the incident, testified that she and another CNA, Ms. Bettencourt, attempted to get the patient off the toilet using a gait belt, but were unsuccessful and lowered her to the floor. Ms. Cahill testified that Ms. Seale did not help them roll the patient onto the seat, nor was she involved in lifting the patient off the toilet and guiding her to the floor.

Ms. Seale testified that she had participated in the maneuver, and, as she was pulled forward, she felt pain behind her right knee. She informed Ms. Cahill immediately that her leg hurt and then told her again later in the day. She testified that on the following day, she experienced pain shooting from her knee up to her right hip and low back when walking. She completed an incident report that day and went to Landmark Medical Center (hereinafter, "Landmark"). She was referred to the Occupational Health Department for orthopedic consultation and physical therapy. She was later seen by Dr. Tarek Wehbe and Dr. Joseph Lifrak, an orthopedic surgeon, who performed arthroscopic surgery on the right knee in May 2000. The employee testified that she worked light duty for Oakland Grove for a few weeks but stopped working in December 2000 because of numbness in the right foot and associated pain. She has not worked since that time.

The incident report indicated that only Ms. Cahill and Ms. Bettencourt were involved in lowering the patient to the floor. Ms. Bettencourt testified that Ms. Seale did assist in getting the patient onto the canvas seat so that they could raise her with the lift. The trial judge found the

testimony of both Ms. Cahill and Ms. Bettencourt to be less than credible and found that a compensable injury to the right knee had occurred in the course of employment which resulted in a period of partial incapacity from November 13, 1999 through October 27, 2000.

The employee has filed the following four (4) reasons of appeal:

> "1. The Trial Justice erroneously concluded that the employee's incapacity ended on October 27, 2000, although on uncontradicted credible evidence established incapacity beyond that date.
>
> "2. The Trial Justice's erroneously concluded that the employee did not sustain an injury to her hip and low back, although the uncontradicted credible evidence was that the employee did in fact sustain an injury to her back and hip.
>
> "3. The Trial Justice erroneously concluded that according to Dr. Greisberg, the employee was capable of returning to her regular job as of October 27, 2000 based upon the condition of her right knee.
>
> "4. The Trial Justice ignored the uncontradicted credible testimony of both attending physicians that the employee sustained an injury to her low back."

The reasons of appeal essentially address two (2) issues. First, did the trial judge err when she found that the employee failed to prove that she sustained work-related injuries to her hip and back. Second, did the trial judge err by finding a closed period of incapacity as it related to the knee.

The employee's initial burden in a workers' compensation proceeding is to advance "credible evidence of probative force" to support his or her position. Botelho v. J. H. Tredennick, Inc., 64 R.I. 326, 331, 12 A.2d 282, 284 (1940). "If the employee cannot show by a preponderance of the credible evidence that he sustained a work-related injury, then he has not sustained this burden." Mazzarella v. ITT Royal Electric Division, 120 R.I. 333, 336, 388 A.2d 4, 6 (1978) (citing Silva v. Matos, 102 R.I. 437, 230 A.2d 885 (1967)). "Questions respecting

the credibility of witnesses or the weight of legal evidence are questions of fact and not of law." Enos v. Industrial Trust Co., 62 R.I. 263, 267, 4 A.2d 915, 917 (1939).

Under R.I.G.L. § 28-35-28(b), "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Rhode Island Supreme Court has recognized that a trial justice's factual findings may be "clearly erroneous" in circumstances where the court misconceives or overlooks material evidence, Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996), or where ". . . although there is evidence to support it, the reviewing court on the basis of the entire evidence is left with the definite and firm conviction that a mistake has been committed." State v. LaRosa, 112 R.I. 571, 576, 313 A.2d 375, 377 (1974); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

A "definite and firm conviction" that a mistake has been made may be reached where the factual determination "'(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'" Coalition to Save our Children v. State Board of Education of the State of Delaware, 90 F.3d 752, 759 (3d Cir. 1996) (quoting Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972)). However, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 574. This deferential standard of review applies equally to inferences and conclusions drawn by the trial justice. Nisenzon v. Sadowski, 689 A.2d 1037, 1042 (R.I. 1997). Thus, if the finding or inference is supported by any competent evidence in the record, an appellate tribunal may not

substitute its view of the evidence for the trial justice's, even though an opposite conclusion may have been reached. Id.; Tim Hennigan Co. v. Anthony A. Nunes, Inc., 437 A.2d 1355, 1357 (R.I. 1981). *See* Blecha v. Wells Fargo Guard-Company Service, 610 A.2d 98, 103 (R.I. 1992). *See also* Gim v. Jan Chin, Inc., 117 R.I. 39, 43-44, 362 A.2d 143, 146 (1976) (noting that the mere contention that the trial judge should have drawn a different conclusion from the conflicting evidence in case was not sufficient to sustain an appeal).

The Rhode Island Supreme Court has held in a long line of cases that testimony may be rejected not solely because it has been shown to be deliberately false but also where, in light of all circumstances, it is not worthy of belief. State v. Luanglath, 749 A.2d 1, 5 (R.I. 2000). Indeed, testimony may be rejected on credibility grounds where it amounts to conjecture, is inherently improbable, vague and unresponsive, implausible, incomprehensible, contradicted by direct or circumstantial evidence, or less reasonable, reliable, and probable than testimony of opposing witnesses.

The medical opinions of Dr. Wehbe and Dr. Greisberg relating the employee's back condition to the incident at Oakland Grove were based on incomplete and inaccurate medical histories. The Appellate Division of the Workers' Compensation Court has specifically recognized that "[if] the history given to a physician is rejected as lacking in credibility or accuracy, the court is free to reject the medical opinions of the physician as incompetent due to inadequate or tainted foundation." Delgado v. Tech Transportation, W.C.C. 00-06811 (App. Div. 12/26/02)(citing Mazzarella, 120 R.I. at 338, 388 A.2d at 7-8); Macomb v. Pride Hyundai, W.C.C. 97-02419 (App. Div. 1999). Based on the history given to these physicians, the trial judge was free to reject the medical opinions based upon the suspect history as incompetent.

The trial justice noted in her decision that neither Dr. Wehbe nor Dr. Greisberg were aware of the employee's previous back injury or injuries at any time during their respective treatment of the patient. The record revealed that just months prior to the November 12, 1999 incident, the employee sought treatment at Landmark for low back pain, giving a further history that her back "locks up" every few months. Both doctors testified that their opinions regarding the back were based in part on the history they received from the employee.

Ms. Seale did not report any hip or back pain until over three (3) weeks after the incident at Oakland Grove. It is well settled in workers' compensation cases that a trial judge is not bound to accept the testimony of an employee "in view of other evidence and inferences reasonably to be made therefrom." Grieco v. American Silk Spinning Co., 75 R.I. 356, 359, 66 A.2d 640, 642 (1949). *See also* Capasso v. Firesafe Builders Products Corp., 74 R.I. 458, 463, 62 A.2d 201, 204 (1948). The employee testified that she experienced pain in her back and hip on the day after the accident, and also relayed that information to the staff at Landmark. However, that testimony was not corroborated by the records introduced into evidence. As counsel for the employer noted, the first reference to right hip pain was in a note of Dr. Wehbe on December 10, 1999. There was no mention of back pain until December 20, 1999.

The timeliness of Ms. Seale's complaints is especially important in this case in light of the testimony of Dr. Greisberg. In his deposition, Dr. Greisberg specifically testified that, throughout his treatment of Ms. Seale, he had assumed that she had experienced back pain immediately following the November 12, 1999 incident. Dr. Greisberg unambiguously noted that if Ms. Seale did not experience back pain until more than a week after the incident, it was unlikely to have been caused by the incident at Oakland Grove:

> "Q: Now, with regard to the back, I take it your opinion that the back is related to the incident that she told you about at the

nursing home is dependent upon the fact that she began to have back pain right away after that incident?

"A: That's correct.

"Q: It's your understanding that on the day of the incident or the day after the incident she had had back pain?

"A: That's correct.

"Q: And your opinion on causal relationship is dependent on that?

"A: Based on the history I got from the patient.

"Q: And if the back pain didn't begin historically for sometime after the incident, . . . the back pain in all likelihood would not be related?

"A: If it was more than a week or two or three, I think that would be correct." (Pet. Exh. 1, pp. 25-26)

A review of the records also confirmed that the opinions of both Dr. Wehbe and Dr. Greisberg as they related to the alleged hip and back injuries were almost entirely based on subjective complaints and not on physical objective findings.

Considered collectively, the facts adduced at trial created inherent inconsistencies and contradictions that justified the trial judge's decision to disregard the opinions of Dr. Wehbe and Dr. Greisberg as they related to the employee's claimed hip and back injuries.

Since the trial judge correctly rejected the back and hip injuries as being causally related to the November 12, 1999 incident, any disability relating to those conditions was likewise not causally related.

Dr. Greisberg, when testifying in reference to his treatment of Ms. Seale on January 8, 2001 opined that as of October 27, 2000, the right knee condition had improved to a point where she could have returned to work.

"Q: Did you perform a physical examination of her right knee?

"A: . . .We did not focus on her right knee on that visit, so I don't think I have any specific notes about her right knee exam from that day.

"Q: What is your recollection about whether there was any change in her condition of her right knee?

"A: Her right knee by that time was not – it was still giving her occasional aching, but it had been improved significantly. I think by the previous visit we had established that the strength in her knee had improved. . . .

"Q: What was her ability to work as a CNA at Oakland Grove with regard to her right knee only at that point?

"A: At that point the right knee was not giving her enough problem to keep her from work. . . ." (Pet. Exh. 1, pp. 19-20)

Treatment on October 27, 2000 and subsequent thereto related to the back condition and not the knee. As noted, the doctor's testimony unambiguously established that any incapacity, insofar as it related to the right knee, had ended by October 27, 2000. The trial judge's conclusion is well supported by the evidence presented to the court.

Consequently, the appeal of the employee is denied and dismissed, and the decision and decree of the trial judge are affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Connor and Hardman, JJ. concur.

ENTER:

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Sowa, J.

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Connor, J.

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Hardman, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed and it is:

ORDERED, ADJUDGED AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on September 6, 2005 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Sowa, J.

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Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Marc B. Gursky, Esq., and Michael T. Wallor, Esq., on

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